

ST. MARY'S UNIVERSITY SCHOOL OF LAW

CONSTITUTIONAL LAW
Professor Michael Ariens

FINAL EXAMINATION-PART II
SPRING 2004

INSTRUCTIONS

1. This part of the examination consists of three (3) pages, excluding this page, and four (4) questions. This examination is worth 70% of your **final** grade, and the value of each question is based on the percentage of time accorded that question. (So, Question I is worth 28% of your **final** grade, and Questions II-IV are each worth 14% of your **final** grade.) Please write your examination number on your bluebook immediately.
2. This examination must be completed within two and one-half (2½) hours. If you do not hand in the examination when I inform you that the examination period is completed, I will leave without collecting your examination, in which case you will receive a failing grade.
3. If you identify yourself in any way in this examination, you will receive a failing grade, and you will be in violation of the Code of Student Conduct.
4. You may bring to this part of the final examination your Ariens, *Constitutional Law* casebook, any handouts given you by me, including TWEN materials, your notes and any outline prepared by you or another student in your study group, your tutor's handouts, and the sample MBE questions. You are **not** permitted to use any commercial outline, any outline prepared by former students in this class or any other outline. You must use black or blue ink when writing your answers, and your answers must be contained in one (1) sixteen (16) page bluebook provided to you at the examination. You may write on every line on one side of the page, or every other line on both sides of the page. If you type, you are limited to no more than 2,750 words.
5. At the end of the examination, please return your bluebook and this cover page to me. You may keep your examination if you wish.

I HAVE NEITHER GIVEN NOR RECEIVED UNAUTHORIZED AID IN TAKING THIS EXAMINATION, NOR HAVE I SEEN ANYONE ELSE DO SO.

EXAM NUMBER

DO NOT TURN TO PAGE ONE OF THIS EXAMINATION UNTIL YOU ARE SO INSTRUCTED

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QUESTION I (60 minutes)

In 1999, residents of the city of New Berlin, Wisconsin were stunned when an 18-year old high school dropout went to a local mall and fired a machine gun (altered from a semi-automatic to allow automatic firing) into a crowd of teens hanging out. Amazingly, no one was killed, although nearly a dozen teens were hospitalized with injuries. After the teen's arrest, police learned that the accused had obtained the gun and the tools needed to alter the gun at a gun show in New Berlin. The city council shortly thereafter adopted an ordinance barring the following: "(a) any gun show within the city limits of New Berlin at which semi-automatic weapons are displayed or sold; (b) the sale of any tools or instruments by which semi-automatic weapons may be altered to automatic weapons; and (c) the advertisement for sale of any tools or instruments, the purpose of which advertisement is to explicitly or implicitly suggest how a consumer may transform semi-automatic weapons into automatic weapons."

Shortly after the ordinance was adopted, several aggrieved persons sued the city of New Berlin, alleging that the ordinance is unconstitutional. One plaintiff is a New Berlin owner of a meeting hall located in the city of New Berlin, who formerly rented out the hall for gun shows, at which place dealers sold guns to consumers. The owner noted that there existed two gun shops in New Berlin, at which semi-automatic weapons were both displayed and sold. A second plaintiff is the owner of a tool shop in New Berlin who sells tools and instruments throughout the United States which can be used to alter semi-automatic weapons into automatic weapons, but which tools and instruments also have other uses. The third plaintiff sells tools and instruments which can be used to transform guns from semi-automatics to automatics. He sends mailings listing the prices for such tools and instruments to current and potential customers living in the city of New Berlin.

You are the law clerk to the federal judge assigned to preside over the case. The judge has asked you to write a memo discussing the constitutional issue(s) involved.

QUESTION II (30 minutes)

In 1990, Congress adopted the following amendment to the Clean Water Act of 1972:

"(1) Congress hereby declares that clean water is essential to the continued prosperity of all Americans, and that all waters of the United States, including the territorial seas shall be protected from environmental disasters, and protected to enhance the quality of American life.

(a) "Waters of the United States" shall include intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, or

natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.

(b) Because over 5.3 million Americans hunted migratory birds, spending \$638 million, and more than 100 million Americans spent almost \$14.8 billion in 1980 to watch and photograph fish and wildlife, therefore, "Waters of the United States" shall also include any body of water which is or may be used as habitat by birds protected by Migratory Bird Treaties; or which may be used as habitat by migratory birds which cross state lines, or which may be used as habitat for endangered species."

In 1998, Art Siena, the owner of a 300-acre site near Columbus, Ohio, filed a request with the Ohio Department of Natural Resources for a permit to fill a "wetlands" area (an area that occasionally was filled with water, but was not part of any flowing river) to prepare the site for the construction of an apartment building. The Ohio DNR notified the local U.S. Army Corps of Engineers, which prohibited Siena from filling the wetlands pursuant to the amendments to the Clean Water Act, because migratory birds, including herons, used Siena's wetlands site for several weeks every year as a habitat. The Corps noted that Congress found in 1996 when adopting another bill (not the Clean Water Act amendments) that "approximately 3.1 million Americans spent \$1.3 billion to hunt migratory birds (with 11 percent crossing state lines to do so) and another 17.7 million Americans observed migratory birds (with 9.5 million traveling for the purpose of observing shorebirds)."

Siena has sued the Corps of Engineers on the ground that its actions violated the federal Constitution. You are a law clerk to a federal judge, who has asked you to draft a memo on the constitutional issue(s) involved.

QUESTION III (30 minutes)

"The reaction of the Court to the Constitutional Revolution of 1937 is an example of winners' history, because a number of the Court's decisions were written based on the assumption that the 'Lochner Court' had gone down the wrong path, and FDR's 'court-reorganization' plan was the necessary spur for that Court to change its mind. In other words, the reaction of the Court indicated it fully believed that its predecessors did 'switch in time to save nine.' This particular version of winners' history is behavioralist, for it assumes that judges are a type of political actor, that constitutional interpretation is an effort to infuse the ideological views of interpreters into provisions of the Constitution, and that any distinction between the will of the judge and the will of the Constitution is false." Discuss.

QUESTION IV (30 minutes)

Daniel Davidson and Kara Gleason, both residents of Houston, Texas, plan to marry. Both are 22, and both recently graduated college. The state of Texas has refused to issue them a marriage license. Daniel is the child of Harry and Betty Davidson. Betty Davidson is Harry's second wife. Daniel has a half-sister, Marianne Gleason, 50, who is the child of Harry Davidson and Yvette

Davidson, Harry's first wife. Marianne Gleason is Kara Gleason's mother. That makes Daniel and Kara uncle and niece. Texas law prohibits marriages between persons who are related as "a parent's brother or sister, of the whole or half blood or by adoption," and "a son or daughter of a brother or sister, of the whole or half blood or by adoption." Davidson and Gleason have sued the state, alleging this prohibition on marriage between "uncle" and "niece" in Texas violates the federal Constitution.

You are a law clerk to a federal district judge. The judge has asked you to write a memorandum concerning the constitutional issue(s) involved.

END OF EXAM